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No. 99-1688

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

THOMAS CHARLES KLEVE, *Petitioner*,

v.

D.R. HILL, Warden CCI, et al., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Supervising Deputy Attorney General
*DOUGLAS L. WILSON
Deputy Attorney General
*Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2393
Fax: (213) 897-2408
Counsel for Respondent

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QUESTION PRESENTED

Whether, in light of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), Petitioner was entitled to habeas corpus relief on the asserted grounds that he had been implicitly acquitted on the charge of conspiracy to commit "first-degree" murder and improperly convicted instead of a "non-existent" crime of conspiracy to commit "second-degree" murder, where (a) state law defined the offense simply as a "unitary" crime of conspiracy to commit any intent-to-kill "murder"; (b) the jury was correctly instructed on the intent-to-agree element of conspiracy and intent to kill; but (c) the jury was further instructed unnecessarily that "premeditation and deliberation" must be proved to establish the object of the conspiracy as "first-degree" rather than "second degree" murder.

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STATEMENT OF THE CASE

In July of 1987, Mark Hallin was arrested for selling cocaine. At that time, Hallin lived on Ramhurst Street in La Mirada, California. (RT 125-126.)[1] Hallin had received the cocaine from a small net work of drug dealers. After his arrest, Hallin agreed to cooperate with the police as an informant. (RT 126-128.)

In September of 1987, one of the chief drug dealers who had been an indirect supplier to Hallin, Renee Green, arranged to have Hallin killed because he was scheduled to testify against one of her drug-dealing associates. Green feared that Hallin's testimony might implicate her. (RT 222-225.)

On September 29, 1987, at about 8:00 p.m., Petitioner and Clinton Calley[2] left Petitioner's house in

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1. The "RT" notation refers to the Reporter's Transcript on direct appeal in *People v. Charles Thomas Kleve*, Los Angeles County Superior Court no. A475355. This transcript was lodged with the district court.

2. Calley worked for Green and frequently used cocaine supplied

Riverside County to go to La Mirada, in Los Angeles County. (RT 288-291, 302-304, 306.) Petitioner and Calley lived within five miles of one another in Riverside County. (RT 212, 230-232.) Petitioner owned a pistol and was a good shot. (RT 270-271, 281, 290, 296, 298-299, 301, 303.) Petitioner and Calley arrived in the area at around 9:00 p.m., and began looking for an address on Ramhurst. (RT 304-305.)

At about 12:30 a.m., Deputy Andrew Garcia of the Los Angeles County Sheriff's Department stopped Petitioner's truck two blocks from Hallin's condominium on Ramhurst in La Mirada. (RT 51, 72, 84-88, 128-129.) When Deputy Garcia asked Petitioner, the driver, to step out of the truck, he saw a gun barrel sticking out from underneath Calley's oversized jacket. (RT 52, 73, 78, 88-90, 93-95, 98-99.) Calley also had an open street map on his lap. (RT 59.)

When Calley was apprehended at the scene, an explosive device was discovered in his jacket pocket. (RT 54, 56, 69-70, 79-80, 82, 100-101, 107, 169-172, 181-184, 206-207, 214.) The device was examined by the arson/explosives unit of the Los Angeles County Sheriff's Office, and it was determined to contain live dynamite that could have been detonated. (RT 71, 106-114.) It was also determined that the device fit Hallin's motorcycle and could have detonated when the motorcycle was started. (RT 115-117.)

Recovered from the pickup truck was a loaded semiautomatic weapon, a .9 millimeter machine pistol which had several live rounds, another magazine which had nine live rounds, and a black handled dagger in a sheath. Found on Petitioner were six live .9 millimeter rounds which fit the machine pistol. (RT 59-62, 64, 66-67, 82, 203-206, 209-211, 214-217.) Also recovered from

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by her. (RT 218-219, 226, 228, 328-329.)

Calley was a note with an address on Ramhurst Street, and a physical description of Hallin, Hallin's wife, and vehicle. (RT 178-179, 189, 263-267.) When given an opportunity to place a telephone call at the police station, Calley contacted Renee Green. (RT 176-177.)

In his defense at trial, Petitioner and his sister testified that they had been shooting in the hills on the afternoon of September 29, and that Petitioner's gun had been left in his truck. (RT 269-272, 290-291, 295.) Petitioner further explained that he was with Calley when they were arrested because he was helping Calley look for an apartment which Calley wanted to rent. (RT 289.) Petitioner denied entering into an agreement with Calley to kill Hallin. (RT 288, 295-297.)

The Los Angeles County District Attorney charged Petitioner and Calley jointly in an eight-count information relating to the attempted assassination of Hallin. Specifically, Petitioner was charged with conspiracy to commit first degree murder (Cal. Penal Code, § 182(1)), with transporting a destructive device (§ 12303.6), possessing a silencer (§ 12520), carrying a loaded firearm in a vehicle while in a public place (§ 12031(a)), and driving a motor vehicle with a loaded firearm. (§ 12034).[3]

There were two trials in this case. As a result of the first trial Petitioner was found guilty of carrying a loaded firearm in a public place, and driving a motor vehicle with a loaded firearm. Petitioner was acquitted of possessing a silencer. The jury deadlocked on the conspiracy and transporting a destructive device counts, and the court declared a mistrial on those counts. On retrial, Petitioner was convicted of conspiracy to commit second degree murder. The jury was unable to reach a verdict on the count of transporting a destructive device.

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3. Documents relating to Petitioner's trial and direct appeal were lodged with both the district court and the Ninth Circuit.

Petitioner was sentenced to state prison, for conspiracy to commit second degree murder, for a term of fifteen years to life, and sentence was suspended on the remaining counts.[4]

An appeal was taken from the judgment. On July 18, 1991, the California Court of Appeal affirmed the judgment. The California Supreme Court denied review. Thereafter, Petitioner filed various habeas corpus petitions in both state and federal court.

On January 6, 1996, Petitioner filed his habeas corpus petition in the federal district court from which the instant Petition arises. On July 7, 1997, the district court filed its order and judgment adopting the recommendations of the magistrate judge, and dismissed the habeas petition. The court held, inter alia, that Petitioner's conviction for conspiracy to commit second degree murder was proper under California law.

On July 30, 1999, the Ninth Circuit Court of Appeals affirmed the district court's judgment denying the habeas petition. *Kleve v. Hill*, 185 F.3d 1009 (9th Cir. 1999).[5] The majority held that Petitioner's conviction for conspiracy to murder was proper under one of two theories. One, that California law might have evolved since the time of Petitioner's conviction, but that Petitioner was not entitled to the benefit of the evolution. Or, two, conspiracy to murder in California is not a matter of degrees and, as instructed, the jury could properly have found Petitioner guilty of that offense. On January 25, 2000, Petitioner's petition for rehearing en banc was

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4. In a separate proceeding, Petitioner was charged with the transportation of methamphetamine. After a court trial, Petitioner was found guilty as charged and sentenced to a three year concurrent term.

5. In an unpublished portion of the opinion, the Court disposed of Petitioner's other substantive claims, and affirmed the district court's judgment.

denied. The published dissent by Judge Kozinski from the denial of rehearing en banc, filed January 25, 2000, is reported at 202 F.3d 1155 (9th Cir. 2000).

REASONS FOR DENYING THE PETITION

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER WAS PROPERLY CONVICTED OF CONSPIRACY TO COMMIT MURDER UNDER CALIFORNIA LAW

A majority of the Ninth Circuit Court of Appeals panel considering this case found that Petitioner was properly convicted of conspiracy to murder under California law.[6] Relying heavily on Judge Dorthy W. Nelson's dissent from the majority opinion, and Judge Alex Kozinski's dissent from the court's denial of the petition for en banc review, Petitioner argues certiorari should be granted because he was convicted of a non-existent crime under California law - conspiracy to commit second degree murder - and he thus suffered a due process violation. (Pet. at 3-14.) Based on this conclusion, Petitioner then asserts that a conflict exists between the Ninth Circuit's decision and that of the Fifth and Eleventh Circuits. (Pet. at 14-15.)

Respondent disagrees. Following the California Supreme Court's interpretation of California law, the Ninth Circuit confirmed that Petitioner was properly convicted of conspiracy to murder.

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6. The United States District Court for the Central District of California reached this same conclusion. And, of course, in order for Petitioner to have exhausted his state court remedies and proceed to federal court on writ of habeas corpus, the California Supreme Court also had to have considered and rejected Petitioner's claim that he was convicted of a crime which does not exist under California law.

In *People v. Swain*, 12 Cal. 4th 593, 909 P.2d 994, 49 Cal. Rptr. 2d 390 (1996), the California Supreme Court concluded that a conspiracy to commit murder is necessarily a conspiracy to commit intent-to-kill (i.e., express malice) murder. 909 P.2d at 1001. The *Swain* court expressly left open, however, the question of whether conspiracy to commit specific intent-to-kill second degree murder is a viable offense, and if so the appropriate punishment. *Id.* at 1002-04. The court later granted review in *People v. Cortez*, 18 Cal. 4th 1223, 960 P.2d 537, 77 Cal. Rptr. 2d 733 (1998), "to determine whether the crime of conspiracy to commit murder is divisible into degrees with differing punishments, or whether all conspiracies to commit murder are conspiracies to commit first degree murder as a matter of law." *Cortez*, 960 P.2d at 539.

The California Supreme Court held in *Cortez* that conspiracy to commit murder is a unitary offense that is punishable in every instance for the penalty prescribed for first degree murder.[7] 960 P.2d at 542. Within the context of a conspiracy it is incorrect to label the target offense of murder by any degree. Rather, as California Supreme Court Justice Stanley Mosk observed, the crime

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7. As a preliminary note, Petitioner's statement, that the majority in the Ninth Circuit's opinion accepted the conclusion that the crime for which Petitioner was convicted did not exist under California law at the time of his conviction (Pet. at 6), is incorrect. The majority of the court properly noted that although the California Supreme Court held in 1998, that there is no crime of conspiracy to commit second degree murder under California law, the *Cortez* decision could represent an evolution in the law since the time of Petitioner's 1989 conviction, and states are permitted to prospectively change their laws. *Kleve v. Hill*, 185 F.3d 1009, 1011 (9th Cir. 1999). (Pet. App. at A-5.) However, for the sake of argument, the court also considered Petitioner's claim, that there was no crime of conspiracy to commit second degree murder in 1989 when Petitioner was convicted.

in question is "*murder simpliciter*" (i.e., simply "conspiracy to commit murder"). *Cortez*, 960 P.2d at 541, 548 (Mosk, J., concurring); *see also Kleve v. Hill*, 185 F.3d at 1013-14. (Pet. App. at A-8 - A-10.) The court concluded that all conspiracy to commit murder necessarily equates with and establishes the metal state of deliberate and premeditated first degree murder. *Id.* at 538, 546. The court reasoned:

> [C]onspiracy is a specific intent crime requiring both an intent to agree or conspire and a further intent to commit the target crime or object of the conspiracy. [Citation.] Murder that is premeditated and deliberated is murder of the first degree. "'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'" [Citations.]
>
> Consequently, it logically follows that were two or more persons conspire to commit murder - i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder - each has acted with the state of mind **"functionally indistinguishable from the mental state of premeditating the target offense of murder."** [Citation.] The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder - hence all murder

> conspiracies are conspiracies to commit first degree murder, **so to speak. More accurately stated, conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder** under the provisions of Penal Code section 182. [Citation.]

Cortez, 960 P.2d at 542 (emphasis added).

The discussion did not end there. The California Supreme Court explained that, in granting Cortez's request for review, it asked the parties to address any error that may have arisen from the trial judge's failure to instruct the jury on premeditation and deliberation. *Id.* at 546. In answering this question, the court stressed that there is "no need for specific instruction on [the theories of] premeditation and deliberation respecting [a] conspiracy count." *Id.* Rather, all that is necessary is for the jury to be instructed with respect to the target offense, is that murder is "'the unlawful killing of a human being . . . with malice aforethought,' and with a definition of malice aforethought. *Id.* at p. 457.[8] In this case, the majority of the Ninth Circuit recognized and considered *Cortez*'s simple instructional mandate, when it evaluated the validity of Petitioner's conviction. *See Kleve v. Hill*, 185 F.3d at 1012-13. (Pet. App. at A-8 - A-9.)

Here, as in *Cortez*, Petitioner's jury was instructed that every person who unlawfully kills a human being with malice aforethought is guilty of murder. (RT 362.) The jury was provided with a definition of malice aforethought, in part, as follows:

> Malice is express when there is manifested an intention unlawfully to kill a human being.

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8. Thus, Petitioner's assertion, drawn from Judge Nelson's dissent from the majority opinion, that "*Cortez* required that premeditation and deliberation must be proven" for a conviction of conspiracy to commit murder (Pet. at 8), is simply incorrect.

> [¶] When it is shown that a killing resulted form the intentional doing of an act with express malice, no other mental state need be shown to establish the mental state of malice aforethought.

(RT 362-363.) As to the conspiracy's target crime of murder, these instructions were all that was required under California law. *See Cortez*, 960 P.2d at 547.

In order to find a defendant guilty of conspiracy to murder, a trier of fact must find both an agreement and an intent to kill. Accordingly, if a jury was so instructed, and returned a verdict of guilty, the theory upon which the defendant was convicted is valid under California law.

Here, the jury was instructed that a "conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder and with the further specific intent and/or mental state to commit such offense. . . ." (RT 365-366.) Under the instructions, both first degree murder and second degree murder under California law required the same mental state of express malice aforethought. *See* Cal. Penal Code §§ 187-89.

As part of the murder instructions, the trial court further instructed the jury that, if they should find the defendant guilty of murder, it would be their duty to state in their verdict whether they found the murder to be of the first degree or the second degree; that murder of the second degree was also the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfully to kill a human being. (RT 365.)

Under *Cortez* a jury faced with a conspiracy to commit murder charge need not, and is not entitled to, make a determination as to whether the target crime was first or second degree murder. The fact that such a verdict was rendered in this case is irrelevant because, as instructed, the jury could only have found Petitioner guilty of "murder simpliciter." In other words, for the jury to

have reached the verdict that it did, the jurors necessarily had to unanimously agree that Petitioner and his co-conspirator, Calley, had the intent to agree and further intended to commit the murder which was the object of their agreement. Consequently, the elements of conspiracy to commit murder under California law were satisfied. *Cortez*, 960 P.2d 547. The fundamental flaw with Petitioner's, and in turn, the dissenting Judges' arguments is that they focus almost exclusively on the titles of the crimes (i.e., "conspiracy to commit first degree murder" versus "conspiracy to commit second degree murder"), without considering the required elements of the actual offense. Simply, all that was required of the prosecution was to prove Petitioner and Calley agreed to kill Hallin and further intended to commit the murder which was the object of their agreement.

It is important to keep in mind the observations of the California Court of Appeal:

> The evidence of [Petitioner's] conduct on the night of his arrest shows that he was not merely present but was a key participant in the crime. He had driven Calley for four hours late at night looking for the address on Calley's note. He acknowledged that he knew Calley had a shotgun with him. Kleve himself had a loaded firearm in the cab of his truck. When Officer Garcia stopped the truck, [Petitioner and Calley] were only one to two blocks away from Hallin's home. The jury had more than sufficient evidence to find that [Petitioner] was an active conspirator in the plan to murder Mark Hallin.[9]

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9. The California Court of Appeal's opinion was provided to the Ninth Circuit Court of Appeals in Petitioner's Excerpts of Record.

II.

THE COURT OF APPEALS' RULING DOES NOT CONFLICT WITH THIS COURT'S *POWELL* DECISION

Citing to *United States v. Powell*, 469 U.S. 57 (1984), the Court of Appeals concluded that Petitioner's acquittal with respect to the first degree murder conspiracy charge and his conviction on the second degree murder conspiracy charge may be seen has nothing more than "inconsistent verdicts." *Kleve*, 185 F.3d 1013 (Pet. App. at A-10.) Petitioner asserts that the Ninth Circuit "refused to follow" *Powell*. (Pet. at 12.) But his argument ultimately acknowledges that there is no conflict with *Powell*; his complaint is that the appellate court erred in "extending" *Powell*. (Pet. at 12-14.) Respondent disagrees. And, in any event, because a decision contrary to the Ninth Circuit's holding is not "dictated" by *Powell*, Petitioner's claim is barred by the anti-retroactivity principle established in *Teague v. Lane*, 489 U.S. 288 (1989).

Under *Teague*, federal habeas corpus relief is ordinarily unavailable if the claim is based on a "new rule" announced by the federal courts for the first time after finality of the Petitioner's state appeal. *Teague*, 489 U.S. at 301. The purpose of *Teague* is "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). A habeas petitioner always has the burden of showing that the rule he seeks to invoke is not "new" within the meaning of *Teague*. *E.g., O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

As defined by *Teague* and its progeny, a "new rule" is one that "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the

defendant's conviction became final.'" *E.g., O'Dell*, 521 U.S. at 156 (citations omitted and emphasis in original); *Teague*, 489 U.S. at 301. Thus, unless the result advocated by the habeas petitioner is actually *dictated* or *compelled* by pre-existing precedent, his claim is a "new rule" claim within the meaning of *Teague*. Even if the result sought is arguably within the "logical compass" of a prior Supreme Court decision, it is not necessarily "dictated" by it within the meaning of *Teague*. *E.g., Butler v. McKellar*, 494 U.S. 407, 415 (1990). In fact, as long as reasonable courts might differ about the application of a rule to a particular situation, that application cannot be deemed to have been "dictated" by precedent. *O'Dell v. Netherland*, 521 U.S. at 160-64 & n.2; *Lambrix v. Singletary*, 520 U.S. 518, 527-39 (1997); *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024-25 (9th Cir. 1991).

"[W]here truly inconsistent verdicts have been reached, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Powell*, 469 U.S. at 64-65; *see United States v. Price*, 750 F.2d 363, 365 (5th Cir. 1985). It is "possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Powell*, 469 U.S. at 65; *see United States v. Price*, 750 F.2d at 365. Nothing in the federal Constitution protects an accused against inconsistent verdicts. *Powell*, 469 U.S. at 65.

Petitioner has not identified any authority which "*compels*" or "*dictates*" a different result here. Because the jury was instructed with respect to both first degree murder and second degree express-malice murder - either one of which was sufficient to sustain a finding as to the target crime in a conspiracy to murder - the jury's finding with respect to the "lesser" conspiracy count was simply

inconsistent with its decision as to the "greater" count. In other words, an acquittal on the first degree murder theory did not necessarily preclude a conviction using the second degree murder theory instructions because the elements with respect to the conspiracy's target offense are identical, i.e., an intent to kill another human being. The jury's finding with respect to the degree of the intended murder was simply superfluous, and the acquittal on the first degree murder theory did not preclude the jury from finding beyond a reasonable doubt that Petitioner had the requisite mental state to commit murder and had agreed to do so.

Petitioner was clearly guilty of conspiracy to commit murder. Yet, he received the windfall of a second degree murder sentence - 15 years to life - instead of the prescribed 25 years to life for first degree murder.

> Given the state of the record in this case, [where Petitioner joined the conspiracy relatively late,] the second degree verdict had to be the product, not of erroneous instructions or prejudicial confusion on the part of the jury, but rather of an attempt by the jury to show unwarranted leniency.

People v. Underwood, 181 Cal. App. 3d 1223, 1237, 226 Cal. Rptr. 840 (1986). Petitioner has already received the benefit of jury leniency not supported by the evidence, and he is in no position to seek outright reversal. *Id.*; *see also People v. Amick*, 20 Cal. 2d 247, 252, 125 P.2d 25 (1942) ("[I]nconsistent verdicts may be caused not by the confusion but the mercy of the jury, of which the [defendant] can neither complain nor gain further advantage."); *People v. Brown*, 35 Cal. App. 3d 317, 326-28, 110 Cal. Rptr. 854 (1973).

Additionally, the Court of Appeals was correct in noting that the verdicts may also be viewed as consistent. The court reiterated the *Cortez* court's pronouncement

that conspiracy to commit murder is not a matter of degree, but rather,

> it may be treated for purposes of punishment as the equivalent of conspiracy to commit first degree murder. Under this reading of *Cortez*, the jury's acquittal on the charge of conspiracy to commit first degree murder - i.e., its finding that [P]etitioner did not conspire to murder with premeditation and deliberation of that murder - is neither here nor there. That is, under this reading, [P]etitioner's crime was not actual conspiracy to commit first degree murder, but rather its functional equivalent. In the words of the California Supreme Court, it was conspiracy to commit first degree murder, "so to speak." *Cortez*, [960 P.2d at 542].

Kleve, 185 F.3d at 1013. (Pet. App. at A-10.)

III.

THERE IS NO CONFLICT AMONG CIRCUIT AUTHORITY

Finally, Petitioner claims that the Ninth Circuit's decision in this case put it in conflict with the Fifth and Eleventh Circuits. (Pet. at14-15.) But, there is no conflict. And, because precedent does not "dictate" relief under the *Teague* doctrine, this Court would not reach the merits to resolve the conflict even if it did exist. *See Penry v. Lynaugh*, 492 U.S. 302, 313-15 (1989).

Petitioner and Judge Kozinski's dissent rely on *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), as the basis for this assertion of a conflict. In *Adams*, the habeas corpus petitioner had been tried in a Florida state court for testifying falsely to a state grand jury. At the close of evidence in the state trial, the defense requested an instruction on "attempted perjury" as a lesser included offense, and the trial court instructed the jury both on perjury and attempted perjury, even though there was no such offense as attempted perjury under Florida law. The jury returned a verdict of guilty on the "lesser" offense of attempted perjury. Adams unsuccessfully challenged his conviction in Florida state courts and then sought habeas relief in the United States District Court, which concluded that no such offense as attempted perjury existed under Florida law and granted the writ on due process grounds. *Adams*, 653 F.2d at 224. On appeal, the Fifth Circuit affirmed, stating, "Nowhere in this country can any man be condemned for a non-existent crime." *Id.* at 225.

Here, it could be concluded that the trial court erroneously instructed on both first and second degree murder when describing the target offense of the conspiracy, believing that conspiracy to commit second degree murder was a lesser included offense. Any error, however, was of no moment because the necessary

elements of the actual target crime are identical under either a theory of first degree or second degree express-malice murder. In other words, to have convicted Petitioner of the unitary offense of conspiracy to murder, the jury had to have found that express-malice (i.e., intent-to-kill) existed along with an agreement between Petitioner and Calley to carry out that crime. As discussed *ante*, these elements existed under either theory of the instructions relating to the target crime.

By contrast, the "attempted perjury" in *Adams* was truly a non-existent crime. In other words, the crime was not the "equivalent" of perjury itself. Here, however, Petitioner was convicted of a crime which, although nonexistent in name, in all elements comprised the main offense. The Ninth Circuit's decision did not conflict with *Adams*" holding that one cannot be convicted of a non-existent crime. Rather, the Ninth Circuit held that one can be convicted of a crime which does exist, even if it is mislabeled. Petitioner's argument thus appears to be more of an alleged misapplication of settled law, rather than an actual conflict between the Circuit Courts of Appeals.

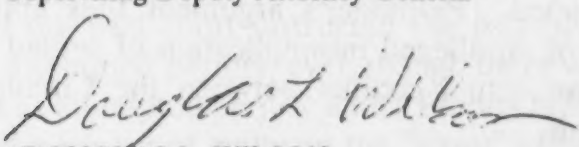
CONCLUSION

Accordingly, based on manner in which the jury was instructed, Petitioner was properly convicted under a viable legal theory for conspiracy to commit murder, and his Petition for Writ of Certiorari should be denied.

Dated: June 30, 2000.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Supervising Deputy Attorney General



*DOUGLAS L. WILSON
Deputy Attorney General
*Counsel of Record

Counsel for Respondent

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